Decisions of The Comptroller General of the United States

VOLUME 63 Pages 1 to 30

OCTOBER 1983

UNITED STATES
GENERAL ACCOUNTING OFFICE

United States Government Printing Office
Washington : 1984

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

COMPTROLLER GENERAL OF THE UNITED STATES

Charles A. Bowsher

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Vacant

ACTING GENERAL COUNSEL

Harry R. Van Cleve

DEPUTY GENERAL COUNSEL

Harry R. Van Cleve

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

Rollee H. Efros

Seymour Efros

Richard R. Pierson

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[B-213015]

Contracts—Protests—Authority To Consider—Pension Benefit Guaranty Corporation Procurements

Protest of solicitation issued by the Pension Benefit Guaranty Corporation will not be considered by the General Accounting Office since the corporation is a wholly owned Government corporation and has broad authority to determine character and manner of its expenditures.

Matter of: CompuServe, Inc., October 3, 1983:

CompuServe, Inc. protests as unduly restrictive certain requirements of solicitation No. 83-17, issued by the Pension Benefit Guaranty Corporation. We must decline consideration of the protest.

The corporation is defined in the Government Corporation Control Act, 31 U.S.C.A. § 9101 (West 1983) (formerly 31 U.S.C. § 846 (1976)), as a wholly owned Government corporation. The corporation is authorized by statute, 33 U.S.C. § 984(a)(9) (1976) to:

> * * * determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed and paid, subject to provisions of law specifically applicable to Government corporation * * *.

This broad discretionary authority is similar to that found in many Government corporations.

Our bid protest authority is predicated on our authority to take exception to the accounts of Federal officers. In view of the broad authority given Government corporations in connection with their expenditures, we have consistently declined to consider protests involving their procurements. See, e.g., *Ingersoll Rand Company,* B-190275, October 12, 1977, 77-2 CPD 289; *Kennerly Associates, Inc.,* B-194274.2, May 8, 1979, 79-1 CPD 320.

Therefore, the protest is dismissed.

[B-210523]

Mileage—Travel by Privately Owned Automobile—First Duty Station Travel—Manpower Shortage Positions

Travel orders of Navy civilian employee limited reimbursement for first duty station travel by privately owned automobile (POA) to the constructive cost of commercial air. Both the Federal Travel Regulations (FTR) and 2 Joint Travel Regulations (2 JTR), however, state that use of POA for such travel is advantageous to the Government. Where the applicable regulations prescribe payment the claim must be allowed, regardless of the wording of the travel orders. See FTR 2-2.3a; 2 JTR C2151(3).

Matter of: Dominic D. D'Abate—Privately Owned Automobile, October 4, 1983:

The issue in this decision is whether reimbursement to a Navy civilian employee for first duty station travel by privately owned automobile (POA) is limited to the cost of travel by common carrier. We hold that, regardless of the wording of the travel orders, where the applicable regulations prescribe that this travel by POA is advantageous to the Government, the employee must be reimbursed on that basis.

This decision is in response to an appeal filed by Mr. Dominic D. D'Abate, of our Claims Group settlement disallowing his claim. Mr. D'Abate, an engineer, was recruited from the University of Puerto Rico, San Juan, Puerto Rico, to fill a manpower shortage position with the Naval Ship Weapon Systems Engineering Station (NSWSES), Port Hueneme, California. Apparently, the Navy recruiter told Mr. D'Abate that his moving expenses would be reimbursed in full. His travel orders, dated August 6, 1980, stated that he was authorized to take a commercial airline flight from San Juan to Jacksonville, Florida, and then to use his POA to travel from Jacksonville to Port Hueneme. The block in his travel orders which ordinarily signifies whether the use of a car is or is not advantageous to the Government was not checked. The travel order did, however, state as follows: "[Travel] cost NTE [not to exceed] airfare from San Juan to Port Hueneme."

After performing the travel, Mr. D'Abate claimed reimbursement for the applicable mileage, per diem, and air travel costs since, in his view, he was entitled to "reimbursement in full." The certifying officer, however, denied his claim for full reimbursement. On June 30, 1981, the Commanding Officer, NSWSES, appealed the certifying officer's decision to the Navy Accounting and Finance Center (NAFC). Noting the legal issues, NAFC forwarded the appeal to our Claims Group. The Claims Group denied Mr. D'Abate's claim because they found that both his travel orders and the pertinent regulations expressly limited the amount of reimbursement to the common carrier cost. This case is an appeal of the Claims Group settlement instituted by Mr. D'Abate. He believes that, regardless of the wording of the travel orders, the agency regulations pre-

scribe mandatory payment of his claim. We agree with Mr. D'Abate's contention.

The Federal Travel Regulations (FTR) were promulgated under the statutory authority of 5 U.S.C. § 5723 (1982) and have the full force and effect of law. Accordingly, we have held that the provisions of the FTR may not be waived or modified by either the employing agency or our Office. 49 Comp. Gen. 145 (1969); *Johnnie M. Black,* B-189775, September 22, 1975. The Joint Travel Regulations, Volume II (2 JTR), applicable here, are the internal regulations of the Department of Defense implementing the FTR.

The relevant provisions of the FTR and 2 JTR clearly establish that use of a POA for first duty station travel is the most advantageous method. FTR paragraph 2-2.3a. states that:

> When an employee, with or without an immediate family, who is eligible for travel allowances under 2-1.2 and 2-1.5, uses a privately owned automobile for permanent change of station travel, that use is deemed to be advantageous to the government. The provisions in 2-2.3 also apply to new appointees, including those covered in 2-1.5f [shortage category employees] * * *.

This provision clearly establishes that first duty station travel by POA for employees in manpower shortage positions, who have signed service agreements, will be considered the most advantageous method to the Government. The provision allows no discretionary authority for agency officials to conclude otherwise. Also, there is nothing in the language to suggest that application of the regulation is limited to transfers between duty stations in the continental United States. B-168883, April 15, 1970.

Consistent with the FTR, 2 JTR contains a similar provision. The relevant paragraph, C2151-3 (later modified by ch. 200, June 1, 1982), states that:

> * * * Except for renewal agreement travel, the use of a privately owned automobile in connection with permanent duty travel will be considered as advantageous to the Government. Permanent duty travel by privately owned airplane or motorcycle and renewal agreement travel by privately owned automobile will be considered as advantageous to the Government when it is determined that the cost of such travel at the rate of $0.185 per mile by privately owned automobile, $0.24 per mile by airplane, and at $0.11 per mile by privately owned motorcycle, including per diem for the actual travel period not in excess of the time required to complete the trip at a rate of 300 miles per calendar day, is less than the cost of travel by common carrier.

Although the above-cited provision limits the reimbursement for travel by privately owned airplane or motorcycle to the constructive cost of common carrier travel, the provision does not so limit the amount of reimbursement for the use of a privately owned automobile while on first duty station travel. See 2 JTR C2151-3 (ch. 167, September 1, 1979).

Accordingly, Mr. D'Abate's method of travel must be considered as advantageous to the Government and the clause in his travel orders purporting to limit his reimbursement is invalid. See B-168883, April 15, 1970, cited above.

The Claims Group settlement is, therefore, overruled, and Mr. D'Abate's reimbursement should not be limited to the cost of airfare from San Juan to California.

[B-210970]

Military Personnel—Permanent Duty Station—What Constitutes—Training or School Assignments for 20 Weeks or More

The Joint Travel Regulations provide that when a service member is ordered to attend courses of instruction at an installation for 20 weeks or more, that installation constitutes his permanent duty station. Thus, orders issued to a Marine which were intended to assign him to courses of instruction at Quantico, Virginia, for more than 20 weeks constituted valid permanent change-of-station orders, and the assignment could not properly be classified as temporary duty on the basis that it might later be, and in fact was, curtailed to less than 20 weeks.

Orders—Canceled, Revoked, or Modified—Rule

Legal rights and liabilities in regard to per diem and other travel allowances vest when the travel is performed under orders, and such orders if valid may not be canceled or modified retroactively to increase or decrease the rights which have become fixed under the applicable statutes and regulations. Consequently, if a service member completes a permanent change-of-station move under valid orders, those fully executed orders are not susceptible to cancellation upon the curtailment of the permanent assignment at a later date. Instead, the member's further reassignment upon his completion of the curtailed assignment could properly be accomplished only through the issuance of new permanent change-of-station orders.

Orders—Canceled, Revoked, or Modified—Rule

Permanent change-of-station orders may be canceled at any time before the orders have been fully executed, that is, before all of the travel and transportation activities involved in the relocation have been completed. Hence, when a Marine traveled to Quantico, Virginia, under permanent change-of-station orders and the orders were later canceled after his assignment there was curtailed, the cancellation was proper because in the particular circumstances involved the Marine had not yet been afforded an opportunity to exercise his statutory right to relocate his dependents and household goods as part of his permanent change-of-station move, and the orders had thus not yet been fully executed.

Orders—Canceled, Revoked, or Modified—Expenses Prior to Change

When a service member is in the process of making a permanent change-of-station move and his orders are canceled before the move is completed, he is then generally entitled simply to travel and transportation allowances sufficient to cover expenses incurred in undertaking the canceled move and expenses involved in returning to the original permanent duty station. However, there is nothing to preclude a service member in that situation from being ordered to perform a temporary duty assignment before returning to the permanent station. Therefore, when a Marine's permanent change-of-station orders for assignment at Quantico, Virginia, were properly canceled, it was also then proper to give him a temporary duty assignment at Quantico prior to his return to his original permanent duty station.

Orders—Canceled, Revoked, or Modified—Subsequent Orders—Effective Date

When permanent change-of-station orders are canceled and are replaced by temporary duty orders, the temporary duty orders become effective on the date they are issued and may not be backdated to increase or decrease retroactively the vested travel and transportation entitlements which had accrued to the member's credit

under the canceled orders. Temporary duty orders issued to a Marine in those circumstances therefore became effective on the date of their publication on April 2, 1981, rather than on March 14 as stated in the orders.

Matter of: Warrant Officer John W. Snapp, USMC, October 4, 1983:

The Disbursing Officer, 2d, Force Service Support Group (Rein), Fleet Marine Force, Atlantic, Camp Lejeune, North Carolina, presented the questions. We have been asked whether temporary duty allowances are payable to a Marine who traveled to Quantico, Virginia, under permanent change-of-station orders which were then canceled and replaced by temporary additional duty orders. The request has been assigned Control Number 83-6 by the Per Diem, Travel and Transportation Allowance Committee. In the particular circumstances presented, permanent change-of-station allowances are payable for travel performed by the Marine under the original orders which were canceled, and temporary duty allowances are payable for the period after the issuance of the new temporary additional duty orders.

Background

On March 5, 1981, orders labeled "Permanent Change of Station" were issued transferring Warrant Officer John W. Snapp, USMC, from Camp Lejeune, North Carolina, to Quantico, Virginia, where he was directed to attend Warrant Officer Basic Course 1-81, followed by a Data Systems Officer Course. The orders stated that the two courses constituted a period of training in excess of 20 weeks. The orders also referred to Quantico as a "temporary duty station," and stated that transportation of dependents and shipment of household goods were not authorized until "establishment of permanent duty station."

In compliance with these orders, Mr. Snapp departed Camp Lejeune on March 9, 1981, and traveled alone by private automobile to Quantico, where he reported for duty on March 15. On April 11 he was informed that his assignment at Quantico would terminate upon his completion of the 13-week Warrant Officer Basic Course, and that he would not participate in the second of the two courses of instruction originally scheduled. At the same time, he received two new sets of written orders. The first set canceled the original permanent change-of-station orders he had received in March. The second set of orders, which stated that they were effective "On or about 14 Mar 81," directed him to proceed from Camp Lejeune to Quantico for 13 weeks of "temporary additional duty," and to return to his permanent duty station at Camp Lejeune upon the completion of the temporary assignment. These new orders had been issued on April 2, 1981, but were not delivered to him until April 11 because of administrative delay.

In compliance with the new orders he had received, Mr. Snapp returned to Camp Lejeune on June 19, 1981, after completing the 13-week Warrant Officer Basic Course at Quantico. Throughout the time in question his dependents remained at the family's permanent quarters near Camp Lejeune. There is no indication that he ever received authorization to move his dependents and household goods to Quantico.

After his return to Camp Lejeune, Mr. Snapp submitted a travel voucher claiming temporary duty allowances for the entire period for March 9 to June 19, 1981, on the basis of his temporary additional duty orders. In requesting a decision concerning the payment that may properly be approved on that voucher, the Disbursing Officer essentially questions the validity of the temporary additional duty orders which were issued to Mr. Snapp in April, since there is no indication that his original permanent change-of-station orders were invalid or erroneous at the time they were issued in March.

General Entitlements Under Permanent Change-of-Station and Temporary Additional Duty Orders

Section 404 of title 37, United States Code, generally provides for payment of travel allowances to a member of a uniformed service who performs travel under orders upon a change of permanent station, or while on a temporary assignment away from his designated permanent duty station. Section 406 of the same title provides that a service member who is ordered on a permanent reassignment is entitled to transportation of dependents and household effects, but this entitlement does not extend to a member ordered to perform a temporary duty assignment.

Implementing regulations are contained in Volume 1 of the Joint Travel Regulations (1 JTR). Those regulations define "temporary duty" as "[d]uty at one or more locations, other then the permanent station, at which a member performs temporary duty under orders which provide for further assignment * * * to a new permanent station or for return to the old permanent station upon completion of the temporary duty." The term "temporary additional duty" is defined as a form of temporary duty involving one journey away from the member's assigned duty station and direct return to the starting point upon completion of the additional duties prescribed. App. J, 1 JTR. When a member is performing temporary duty while he is away from his permanent duty station, he is deemed to be in travel status and is thus entitled to travel allowances, including a per diem to cover the cost of quarters, subsistence and other expenses arising during all periods of temporary duty and travel. Paras. M3050-2, M4200-1, and M4202-1, 1 JTR.

The regulations further provide that a member performing duties at his permanent duty station is not entitled to a per diem

because he is not in a travel status. Para. M4201-4, 1 JTR. See also *Matter of Browne*, B-189601, December 30, 1977. However, a member traveling from one permanent duty station to another under permanent change-of-station orders is in a travel status and is entitled to a mileage allowance for travel performed by private automobile. 1 JTR, paras. M3050-2, M4151, and M4201-1.

Validity of Original Permanent Change-of-Station Orders

Whether duty may be properly classified as permanent or temporary is generally a question of fact to be determined from the orders directing the assignment or the purpose and duration of the assignment itself. See, e.g., 53 Comp. Gen. 44, 46 (1973); and *Matter of Myers,* B-187744, October 25, 1977. However, concerning training assignments the Joint Travel Regulations specifically state that when a service member is ordered to attend one or more courses of instruction at a single installation for a cumulative duration of at least 20 weeks, that installation constitutes his permanent duty station regardless of the terms of the orders involved. App. J, 1 JTR. We have held that under this provision of the regulations, orders issued to a service member which are intended to assign him to courses of instruction at an installation for a continuous period of 20 weeks or more constitute valid permanent change-of-station orders, and the possibility that the assignment might later be curtailed is not a proper basis for classifying the assignment as temporary duty. 37 Comp. Gen. 637 (1958). See also 46 Comp. Gen. 852 (1967).

In addition, we have long and consistently held that provisions of travel orders which do not conform to the applicable statutes and regulations are ineffective and cannot create an otherwise unauthorized entitlement to travel allowances. See, e.g., *Matter of Willis*, 59 Comp. Gen. 619, 621 (1980); *Matter of Sutphen*, 57 Comp. Gen. 201, 203-204 (1978); and *Matter of Andros Island*, B-201588, March 25, 1981.

In the present case, the orders originally issued to Mr. Snapp in March 1981 were for a training assignment at Quantico, Virginia, for a period in excess of 20 weeks, and there is no indication that the orders were prepared in error or that a shorter assignment was actually intended at the time. Hence, they constitute valid permanent change-of-station orders, notwithstanding the inconsistent provisions they contained which referred to Quantico as a "temporary duty station" and which placed restrictions on the transportation of Mr. Snapp's dependents and household goods. It follows that under those orders Mr. Snapp was entitled to allowances for his personal travel, and the transportation of his dependents and household goods, to his new permanent duty station at Quantico. However, those orders provided no entitlement to per diem for him for periods after his arrival at Quantico.

Cancellation of Permanent Change-of-Station Orders

It is well established that legal rights and liabilities in regard to per diem and other travel allowances vest when the travel is performed under orders, and that such orders may not be canceled or modified retroactively to increase or decrease the rights which have become fixed under the applicable statutes and regulations unless error is apparent on the face of the orders, or all the facts and circumstances clearly demonstrate that some provision previously determined and definitely intended had been omitted through error or inadvertence in the preparation of the orders. See, e.g., *Matter of Fritz*, 55 Comp. Gen. 1241, 1242 (1976); 47 id. 127, 130 (1967); and 44 *id.* 405, 407-408 (1965).

Consistent with this rule, we have held that permanent change-of-station orders may not be canceled after all the travel and transportation activities required to complete the permanent move have been accomplished and the orders have been fully executed, when there is no indication that the orders were materially in error when issued. See *Matter of Adler,* B-204210, April 5, 1982. This is so even if the individual concerned has not used his entitlement to have his dependents and household goods relocated as part of the permanent change-of-station move, where it appears that the individual was given an opportunity to relocate them but elected not to do so for personal reasons. See *Matter of Drossel,* B-203009, May 17, 1982. After the permanent change-of-station move has been fully completed, the permanent assignment may be terminated or curtailed at any time thereafter because of official necessity or other reason, but this is done through the issuance of new permanent change-of-station orders and cannot properly be accomplished through the publication of orders which purport to cancel the original orders and retroactively transform the entire arrangement into a temporary duty assignment. See 34 Comp. Gen. 427 (1955); *Matter of Zahrt,* B-205403, January 8, 1982; and *Adler* and *Drossel,* cited above.

On the other hand, permanent change-of-station orders may be canceled at any time before they have been fully effected or executed, that is, before all of the travel and transportation activities involved in the relocation have been completed. Cancellation of the orders in those circumstances is valid, and the statutes and regulations applicable to that situation specifically authorize travel and transportation allowances for return to the original permanent duty station. See 37 U.S.C. 406a, and paras. M4156 (case 4), M7051, and M8014, 1 JTR.

As indicated, in the present case the permanent change-of-station orders Mr. Snapp received in March 1981 were not issued in error and constituted valid orders. Hence, in our view those orders could not properly have been canceled after Mr. Snapp completed his permanent change-of-station move and the orders were fully ex-

ecuted. Therefore, the question is whether the orders had been fully executed in April when the action was taken to cancel them.

If Mr. Snapp had been authorized transportation for his dependents and household goods to his permanent duty station at Quantico in March 1981, and he had either moved his family there or elected to have his family remain in North Carolina for the duration of his assignment, then it would have been our view that his permanent change-of-station move had been completed in March and that his permanent change-of-station orders could not have been canceled. Compare *Matter of Drossel,* cited above. If that had occurred, the only proper method available for returning him to permanent duty in North Carolina would have been through the issuance of new permanent change-of-station orders reassigning him from Quantico to Camp Lejeune. Compare *Matter of Zahrt,* cited above.

However, Mr. Snapp's orders as written prohibited the concurrent transportation of his dependents and household goods when he traveled to Quantico on permanent assignment in March 1981, and there is no indication that he was then afforded an opportunity to exercise his statutory right to relocate them at any time before action was taken to cancel the orders in April. Our view is that Mr. Snapp's permanent change-of-station move remained incomplete in April because of this, so that the orders remained susceptible of cancellation. Hence, we conclude that the action taken to cancel the permanent change-of-station orders was valid.

Validity of Temporary Additional Duty Orders

As mentioned, when a service member is in the process of making a permanent change-of-station move and his orders are canceled before the move is completed, he is then generally entitled simply to travel and transportation allowances sufficient to cover expenses incurred in undertaking the canceled move and expenses involved in returning to the original permanent duty station. See 37 U.S.C. § 406a, and paras. M4156 (case 4), M7051, and M8014, 1 JTR, cited above. However, there is nothing to preclude a service member in that situation from, instead, being ordered to perform a temporary duty assignment. Moreover, we have specifically held that when a service member commences travel on a permanent assignment which is then converted into a temporary assignment before the permanent change-of-station move is fully effectuated, entitlement to per diem becomes fixed upon the issuance of the temporary duty orders notwithstanding any delays in the actual delivery of those orders to the member. See 53 Comp. Gen. 78 (1973).

In the present case, therefore, we have no basis to question the validity of the temporary additional duty orders which were published on April 2, 1981, and which were later delivered to Mr.

Snapp on April 11, except for the entry in those orders stating that they were effective "On or about 14 Mar 81." We consider that entry invalid, since if given effect it would result in an improper retroactive increase in the travel allowances which had become fixed and payable under his previous orders. Compare 47 Comp. Gen. 127, 130, cited above. Hence, we consider the effective date of Mr. Snapp's temporary additional duty orders for travel allowance purposes to be the date they were issued on April 2, 1981. Compare 53 Comp. Gen. 78, cited above.

Amounts Payable on Travel Voucher

For the foregoing reasons, we conclude that Mr. Snapp is entitled to permanent change-of-station allowances for travel performed in compliance with his original permanent change-of-station orders. These would include a mileage allowance for his travel from Camp Lejeune to Quantico by private automobile between March 9 and 15, 1981, but would not include per diem. 1 JTR, paras. M3050-2, M4151, M4201-1, and M4201-4. We also conclude that Mr. Snapp is entitled to temporary duty allowances for all periods of duty and travel performed from the date his temporary additional duty orders were issued on April 2, 1981, to the date of his return to Camp Lejeune on June 19, 1981. These would include per diem, and also a mileage allowance for his return travel by private automobile. 1 JTR, paras. M3050-2, M4200-1, M4202-1, M4203-4, and M4205.

Accordingly, the voucher and related documents are returned for further processing consistent with the conclusions reached in this decision.

[B-212729]

Interest—Debts Owed U.S.—Debt Collection Act of 1982—Section 11—Assessment Pending Waiver Determination

The assessment of interest on Federal overpayments pursuant to section 11 of the Debt Collection Act prior to completion of a statutory waiver process depends upon whether the applicable waiver provision is permissive or mandatory. If the waiver provision is permissive, interest should be assessed from the date of the agency's initial notification of the overpayment. If the waiver provision is mandatory, interest should not be assessed until the waiver process is completed.

Matter of: Debt Collection—Assessment of Interest Pending Waiver Determination, October 4, 1983:

The Director of the Office of Workers' Compensation Programs (OWCP), Department of Labor, has requested our opinion concerning assessment of interest on Federal overpayments under the Federal Claims Collection Act, as amended by the Debt Collection Act of 1982. The question presented is whether interest must be assessed prior to the completion of a statutorily mandated waiver process. We hold that the assessment of interest pending resolution

of a request for waiver depends upon whether the applicable waiver provision is permissive or mandatory. If the recipient of an overpayment requests waiver under a mandatory waiver statute, interest should not be assessed until completion of the waiver process.

The Federal Claims Collection Act of 1966, now codified at 31 U.S.C. § 3711, established a Government-wide system of debt collection. The Act provides the basic legal framework for agency collection of debts owed to the United States, with oversight by the General Accounting Office and the Department of Justice. The regulations issued jointly by the Comptroller General of the United States and the Attorney General of the United States, the Federal Claims Collection Standards (FCCS), are found at 4 C.F.R. Parts 101-105.

The Debt Collection Act of 1982 (Pub. L. No. 97-365, 96 Stat. 1749) amended the Federal Claims Collection Act by establishing a number of new procedures to augment the Government's authority to collect debts while ensuring basic due process protections for debtors. To this end, section 11 of the Act, codified at 31 U.S.C. § 3717, authorizes Federal agencies to assess interest on outstanding debts owed to the United States.[1]

The guidelines and general policies concerning assessment of interest on debts under section 11 are included in a proposed revision to the FCCS. (The proposed regulations, issued jointly by the General Accounting Office and the Department of Justice, were published for comment on May 24, 1983, 48 Fed. Reg. 23249, and are subject to change upon being issued as final regulations. References to the FCCS will be to these proposed regulations unless otherwise specified.) These standards require generally that interest be assessed on debts under specified conditions, but only after the debtor has been provided written notice explaining the interest charge. 4 C.F.R. § 102.13. Interest will generally accrue from the date of this notice. However, such interest may be waived under 31 U.S.C. § 3717(h) and section 102.13(g) of the Standards.

OWCP has advanced a number of arguments to support the proposition that interest should not be assessed until a statutorily mandated waiver process is complete. We find it unnecessary to review these arguments in detail, however, because in our view, the result follows logically and reasonably from the Supreme Court's decision in *Califano* v. *Yamasaki,* 442 U.S. 682 (1979). In *Yamasaki,* the Secretary of Health, Education, and Welfare sought to recoup an overpayment under the Social Security Act by withholding the future

[1] Section 8(e) of the Debt Collection Act, codified at 31 U.S.C. § 3701(d), exempts claims arising under or amounts payable under the Internal Revenue Code of 1954, the Social Security Act, or the tariff laws of the United States. Our decision is aimed at those programs and agencies which are subject to section 11. Nevertheless, it may provide guidance even to programs and agencies which are exempt from that provision. See 62 Comp. Gen. 599 (1983).

benefits to which the recipient was entitled. Pursuant to a request for waiver of the overpayment under section 204(b) of the Social Security Act, 42 U.S.C. § 404(b),[2] the recipient demanded an opportunity for hearing before recoupment began.

The Court stated that section 204 "requires that the Secretary make a pre-recoupment waiver decision, and that the decision, like that concerning the fact of the overpayment, be accurate." 442 U.S. at 693. The Court went on to note that the requirement for a pre-recoupment waiver decision was generally satisfied by the Secretary's regulatory scheme whereby "no recoupment is made until a preliminary waiver * * * decision has taken place, either by default after the recipient has received proper notice, or by review of a written request." *Id.,* at 694. However, the Court held that an opportunity for a pre-recoupment oral hearing is required when a recipient requests waiver under section 204(b).

In reaching its conclusion, the *Yamasaki* court noted that section 204(b) of the Social Security Act is a "mandatory" waiver statute and distinguished it from "permissive" waiver provisions.[3] Thus, under a mandatory waiver statute, the "creditor agency" must notify the recipient of the overpayment of his right to a consideration of waiver. If the recipient then requests waiver, recoupment action may not commence until completion of the waiver process. In contrast, if the waiver provision is entirely permissive, recoupment may begin at any time, regardless of when the waiver decision takes place.[4]

In our opinion, the concept of the *Yamasaki* case should apply as well to the assessment of interest. While interest serves to compensate a creditor for loss of the use of money, in the specific context of the Debt Collection Act it serves a perhaps more important purpose—to encourage the prompt payment of debts owed to the United States. The authority to charge interest is essentially another weapon in the Government's debt collection arsenal. The message of *Yamasaki,* in effect, is that where a mandatory waiver statute applies, there is no debt upon which collection action may be pursued—stated differently, the overpayment does not "ripen" into a debt—until the waiver process has run its course. This being the case, charging interest during the waiver process could penalize

[2] 42 U.S.C. § 404(b) provides: "In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

[3] The Court cited several examples of each type. 442 U.S. at 693, footnote 9. A mandatory waiver statute "at least imposes * * * a duty to decide." *Id.*

[4] To say that recoupment *may* begin at any time is not to say that it *must.* In connection with 5 U.S.C. § 5584, 10 U.S.C. § 2774, and 32 U.S.C. § 716 (all permissive waiver statutes), we have held that, while automatic suspension of collection action in all cases upon receipt of waiver applications would not be proper, suspension in individual cases in appropriate circumstances pending outcome of the waiver determination is permissible. B-185466, August 19, 1976.

the recipient who is without fault but who still does not meet the waiver standards for pursuing his statutory right to seek waiver.

Where a mandatory waiver statute applies, the agency should still include the interest requirement as part of the initial notification to the recipient of the overpayment. See proposed 4 C.F.R. §§ 102.2(b) and 102.13(a), 48 Fed. Reg. 23251 and 23253. If, upon proper notification, the recipient declines to seek waiver, interest should be assessed in accordance with 31 U.S.C. § 3717 and the proposed 4 C.F.R. § 102.13. If, however, the recipient requests waiver, interest should not begin to accrue until completion of the waiver process, or earlier if the recipient acknowledges the debt.

Where a permissive waiver statute applies, interest should be assessed from the date of the initial notification as provided in 31 U.S.C. § 3717(b) and (d). However, we have held that an agency may suspend collection action on a debt pending consideration of waiver under a permissive waiver statute under certain circumstances. B–185466, August 19, 1976, incorporated into the FCCS as proposed 4 C.F.R. § 104.2(c), 48 Fed. Reg. 23256. The agency could apply the same criteria to suspend the collection of interest. If waiver is ultimately granted, the question of interest then becomes moot. If waiver of the underlying debt is not granted, the agency still has authority to separately consider waiving the interest. 31 U.S.C. § 3717(h) permits an agency to "prescribe regulations identifying circumstances appropriate to waiving collection of interest" as long as they are consistent with the FCCS. See also the proposed 4 C.F.R. § 102.13(g), 48 Fed. Reg. 23253–54. The agency could use this authority to consider such additional factors as the length of time it has taken to make the waiver determination on the underlying debt.[5]

Against this background, we turn now to the two specific programs cited by OWCP. First is the Black Lung Benefits Program. The waiver authority for this program is found in 30 U.S.C. § 923(b), applicable to the OWCP program by virtue of 30 U.S.C. § 940. It provides in pertinent part that "the provisions of section 204 * * * of the Social Security Act * * * shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister, or dependent, as if benefits under this part were benefits under title II of such Act * * *." Section 204 of the Social Security Act, 42 U.S.C. § 404, is the same provision the Supreme Court considered in *Yamasaki.* The waiver authority for the Black Lung Benefits Program is, therefore, clearly a mandatory provision.

[5] In a separate memorandum, the OWCP Director called our attention to the inequities that may result if interest is charged on a large debt which the debtor is able to repay only in small installments. If the interest rate is high enough and the installment small enough in relation to the size of the debt, it is not inconceivable that the debt could never be repaid, resulting in creation of a "perpetual debtor." How or whether to treat this precise situation in the FCCS has yet to be determined. In any event, 31 U.S.C. § 3717(h) provides adequate authority for agencies to deal with the problem.

The second program is the Federal Employees' Compensation Program. The waiver authority for this program is 5 U.S.C. § 8129(b):

> Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

While the statutory language is not identical to 42 U.S.C. § 404(b), this also is a mandatory waiver provision. Resort to the original statutory language removes any doubt. The original enactment provided "there shall be no adjustment or recovery" (63 Stat. 864), and this language was carried in the United States Code until the 1966 recodification of Title 5 modified it to the present 5 U.S.C. § 8129(b). See 5 U.S.C. § 788(b) (1964 ed.).

In sum, we conclude that if the recipient of an overpayment or erroneous payment requests waiver under a mandatory waiver provision such as 30 U.S.C. § 923(b) or 5 U.S.C. § 8129(b), interest should not be assessed until completion of the waiver process. If the waiver provision is permissive, interest should be assessed from the date of the agency's written notification in accordance with 31 U.S.C. § 3717(b), unless the collection of interest is itself waived under the authority of 31 U.S.C. § 3717(h) and the FCCS.

[B-210426]

Contracts—Negotiation—Conflict of Interest Prohibitions—Status of Offeror

Protest is sustained where agency's rejection of a proposal based on an alleged conflict of interest was unreasonable. Although the protester proposed to hire an employee of the agency and the employee accompanied the firm during its negotiations with the agency, the employee did not participate in the negotiations and there is no evidence that he exerted any improper influence on behalf of the protester. Since the protester has a substantial chance for award but for the agency's improper action, proposal preparation costs are recommended.

Matter of: Chemonics International—Consulting Division, October 7, 1983:

Chemonics International Consulting Division protests the rejection of its proposal by the Agency for International Development (AID) under request for proposals (RFP) No. 650-0047. The solicitation was for technical services, to be performed over a 4-year period, for the Sudan Agricultural Planning and Statistics Project. We sustain the protest.

Background

Proposals were received from two firms, Chemonics and Checchi and Company. Discussions were held with both offerors in Nairobi, and Chemonics was subsequently selected for contract award. Prior to the award, however, the regional legal adviser discovered a pos-

sible conflict of interest, and the procurement proceedings were suspended pending an Inspector General's (IG) investigation into the matter.

The alleged conflict of interest arose from Chemonics' proposed employment of an AID employee as a member of the team which would perform the contract.[1] At the request of the contracting officer, this employee accompanied the Chemonics negotiating team to Nairobi and was present during the firm's discussions with the contracting officer.

Before the IG's investigation was completed, the contracting officer notified Chemonics that it was proceeding with an award to Checchi. Chemonics filed a protest with this Office against any such action. AID subsequently notified GAO of its intent to award the contract during the pendency of the protest. *See* 4 C.F.R. § 21.4 (1983). AID stated that any further delay in the implementation of the Sudan project would create serious impediments to U.S. foreign assistance commitments.

Shortly before the contract was actually awarded to Checchi, however, the IG completed his investigation and determined that the circumstances did not support a referral to the Justice Department for prosecution of the employee. AID nevertheless proceeded with the award to Checchi. AID indicates that its decision primarily was based on a conclusion that the actions of the employee created a conflict of interest.

Analysis

AID states that even though the IG found no basis for criminal prosecution, the regional legal adviser concluded that a conflict of interest existed. The reasons for this conclusion appear to be the employee's attendance at the negotiations and the use of his official Government passport to travel to Nairobi. AID indicates that the regional legal adviser and the AID General Counsel concluded that these actions were inconsistent with the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered titles of U.S.C.), with 18 U.S.C. § 1544 (1976) (pertaining to improper use of a passport), and with the Office of Personnel Management regulations governing employee responsibilities and conduct at 5 C.F.R. § 735.101 *et seq.* (1983).

The responsibility for determining whether a firm has a conflict of interest and to what extent the firm should be excluded from competition rests with the procuring agency, and we will overturn such a determination only when it is shown to be unreasonable. *N.D. Lea & Associates, Inc.,* B-208445, February 1, 1983, 83-1 CPD 110. In this case, we find that AID's determination to exclude Chemonics from the competition was unreasonable.

[1] The employee worked in AID's Office of Agriculture on loan from the U.S. Department of Agriculture.

There is nothing to suggest that the employee exerted any improper influence on behalf of Chemonics here, or that the firm obtained any improper competitive advantage through the employee. See *National Service Corporation,* B-205629, July 26, 1982, 82-2 CPD 76; *Riggins & Williamson Machine Co., Inc.,* B-186723, December 6, 1976, 76-2 CPD 463.

In fact, the record shows that the employee came to the Sudan at the request of the contracting officer, who was aware that he was an AID employee, for the sole purpose of discussing his experience and qualifications. Although AID emphasizes that Chemonics sent two messages which referred to the group coming to the Sudan as its "negotiating team," Chemonics explains that its choice of words resulted from the fact that the primary purpose of the trip was to attend the negotiations. Chemonics asserts that the employee was present at the negotiations solely as an observer, and that he did not participate in the negotiations. AID does not deny this, and nothing in the record indicates otherwise.

In addition, we note that in a sworn statement to the IG, the employee denied having any prior knowledge of the details of the Sudan project, and stated that his AID employment did not involve him in the project in any way. The sworn statement also shows that the employee informed his supervisor of his proposed employment by Chemonics, and that the supervisor raised no concern. While AID notes that the employee did not follow AID's established procedure for obtaining an advisory opinion on conflict of interest questions, there is nothing to suggest that this failure resulted from any improper motivations. Rather, it appears that the employee believed he should seek advice from the Department of Agriculture (the agency from which he was on loan) since he did consult with a counselor there.

The record before us simply contains no evidence that the employee's involvement undermined the integrity of the competition, and we therefore conclude that AID lacked a reasonable basis to reject Chemonics' proposal. See *Satellite Services,* B-206954, October 4, 1982, 82-2 CPD 308; *J. L. Associates, Inc.,* B-201331.2, February 1, 1982, 82-1 CPD 99. Consequently, we sustain the protest.

Remedial Relief

Several months prior to the award to Checchi, Chemonics informed the contracting officer that one of its proposed key employees was no longer available. At the same time, Chemonics proposed two alternates for the position, both of whom were described as "100 percent available." The contracting officer never responded to Chemonics in that regard.

In support of proceeding with an award to Checchi, the AID/Sudan office indicated that there was no assurance that Chemonics could supply an acceptable candidate for the position and stated

that it could not agree to further delay which would result from posting a Chemonics team. It also noted that Chemonics' proposal originally was selected over Checchi's primarily due to the superiority of Chemonics' key personnel. It stated that Checchi's proposed personnel were still available and were considered to be "of a high professional standard," and that Checchi's proposed costs were somewhat less than those of Chemonics. It concluded that in light of these facts, nothing could be "gained by further negotiations with Chemonics."

It is unclear from the record to what extent the decision to award to Checchi is actually supported by the change in Chemonics' proposed personnel, since AID has relied primarily on the alleged conflict of interest to justify its rejection of the proposal. In any event, it appears that the alternate candidates proposed by Chemonics were given no consideration by the contracting officer, even though he was aware of the change well before contract award and the candidates were represented as definitely available.

On these facts, we would ordinarily recommend that negotiations be reopened with Chemonics to determine the acceptability of the alternate candidates, and that Checchi's contract be terminated and award made to Chemonics if its proposal was determined superior. However, we do not believe this would be appropriate under the particular circumstances present here.

AID argues that even if acceptable candidates are still available, contract termination is not a practical remedy. It states that projects such as this require an initial period of cultivating relationships and developing rapport with Mission and host-country personnel, and therefore that one contractor's personnel cannot replace another's without an undesirable loss of momentum. It emphasizes the importance of the project to U.S. efforts in the Sudan and the need for the project's timely completion. We are not in a position to question this assessment.

Nevertheless, we believe that Chemonics is entitled to recover the costs of preparing its proposal. These costs are recoverable where the Government acted arbitrarily and capriciously with respect to a proposal, and the offeror had a substantial chance of receiving the award except for the agency's improper action. See *M. L. MacKay & Associates, Inc.*, B-208827, June 1, 1983, 83-1 CPD 587.

Here, AID unreasonably excluded Chemonics' proposal from consideration and as a result, never determined the acceptability of the alternate candidates. Nonetheless, in light of the superior rating given its best and final offer, we believe it is fair to say that Chemonics had a substantial chance for award. We therefore believe the protester should be entitled to receive its proposal preparation costs since the agency's improper action precluded it from demonstrating the acceptability of the alternate candidates. *Id.*

Chemonics should submit documentation to support its costs to the agency.

The protest is sustained.

[B-211380]

Quarters Allowance—Members Without Dependents—Assigned to Vessels—Transfer to Another Vessel—Homeport Remains the Same

A naval officer or enlisted member above grade E-6 who is "without dependents" is entitled to a basic allowance for quarters while assigned to a ship at its homeport if he elects not to occupy available Government quarters. The member continues to receive the allowance for the first 90 days the ship is deployed. He is also entitled to receive the allowance for 90 days after transfer to a deployed vessel if the homeport of that ship is the same as the homeport of his previous assignment and he was receiving the allowance at the homeport at the time of the transfer.

Matter of: Ensign John Kiers, USN, October 12, 1983:

Is Ensign John Kiers, USN, entitled to a basic allowance for quarters for the period subsequent to his assignment to the *USS Santa Barbara* while the ship was on an extended deployment?[1] We conclude that Ensign Kiers is entitled to a basic allowance for quarters for a period of 90 days following the day he reported to the ship.

Facts

Pursuant to permanent change-of-station orders, Ensign Kiers (grade 0-1) was transferred from *USS Davis,* which was in its homeport of Charleston, South Carolina, to the *USS Santa Barbara* on January 29, 1983. On that day, the ship was in the 67th day of a 204-day deployment from its homeport of Charleston, South Carolina. Prior to reporting, Ensign Kiers was receiving a basic allowance for quarters at the "without-dependents" rate. Because the disbursing officer on the *USS Santa Barbara* is uncertain of the entitlement of Ensign Kiers to the allowance in view of 37 U.S.C. § 403(c) (Supp. IV 1980), which prohibits the payment of basic allowance for quarters to persons on sea duty, no payment has been made to Ensign Kiers pending our decision in this case.

The payment of a BAQ is governed by 37 U.S.C. § 403 which provides:

(b) * * * However, subject to the provisions of subsection (j) of this section, a member without dependents who is in a pay grade above pay grade E-6 and who is assigned to quarters of the United States * * * may elect not to occupy those quarters and instead to receive the basic allowance for quarters prescribed for his pay grade by this section.

* * * * * * *

[1] R. F. Gonzalez, Disbursing Officer on the *USS Santa Barbara* (AE-28), requested a decision in this case. The request was cleared through the Department of Defense Military Pay and Allowance Committee and assigned submission number DO-N-1417.

(2) A member of a uniformed service without dependents who is in a pay grade below pay grade E-7 is not entitled to a basic allowance for quarters while he is on sea duty. A member of a uniformed service without dependents who is in a pay grade above E-6 and who is on sea duty is not entitled to a basic allowance for quarters while the unit to which he is assigned is deployed for a period in excess of 90 days.

(3) For the purposes of this subsection, duty for a period of less than three months is not considered to be field duty or sea duty.

The phrase "while the unit to which he is assigned is deployed for a period in excess of 90 days" is defined as applying to periods of time commencing on the 91st day the unit to which the member is assigned is deployed. Section 401(f) of Executive Order 11157, as amended by Executive Order 12274, January 16, 1981, 43 F.R. 5855.

Under applicable regulations a member without dependents on sea duty for 3 months is entitled to a basic allowance if he is an officer or is enlisted in pay grades E-7 or higher while aboard ship in homeport and elects not to occupy available quarters. The entitlement ceases after the 90th day the ship is deployed. Department of Defense Military Pay and Allowances Entitlements Manual, Table 3-2-3, Rule 8, change 71, December 20, 1982 (formerly Rule 9).

The law and the regulations contemplate that an officer or enlisted member in pay grade E-7 or higher who is "without dependents" may elect not to occupy available quarters on the ship while it is in homeport and receive basic allowance for quarters at the without-dependents rate. The applicable regulations clearly provide that he continues to be entitled to a basic allowance for quarters after he is deployed with his ship until the ship has been deployed for 90 days.

In Ensign Kiers' case, he had elected not to occupy quarters on his former ship while it was in homeport and was receiving basic allowance for quarters. Upon his transfer to the *USS Santa Barbara* he necessarily had to occupy quarters on the vessel since it was in the 67th day of a 204-day deployment.

Ordinarily, in this situation, the member's entitlement to a basic allowance for quarters would terminate since he has been assigned to Government quarters and he would have no alternative but to occupy them. However, the permanent station of a member assigned to a ship is the ship, but it also includes the homeport of the vessel. See Executive Order 11157, as amended, and 48 Comp. Gen. 40 (1968).

The homeport of both his former and new assignments is the same and since the homeport is included in the definition of permanent station for a member assigned to a ship, Ensign Kiers' situation must be viewed as not involving a permanent change of station for the purpose of entitlement to basic allowance for quarters.

Thus, since Ensign Kiers was receiving basic allowance for quarters at the homeport of the ship to which he was assigned, he may continue to receive the allowance for 90 days after he reported to

it. We would like to emphasize that this result is only occasioned by the fact that both units involved had the same homeport. If that were not so he would be required to qualify for the allowance at the new homeport before continued entitlement for 90 days could be allowed. The question is answered accordingly.

[B-211522]

Compensation—Removals, Suspensions, etc.—Backpay—Availability of Employee to Work

An applicant was not selected for a teaching position at West Point Elementary School and filed a discrimination complaint with the Equal Employment Opportunity Commission. The Commission ordered the Army to offer her employment with backpay and, if she declined employment, the pay she would have received from September of 1979 until the date the offer was made. The applicant is entitled to the full amount of her claim because, according to the applicable regulations, she was available for the position during the entire period even though she accompanied her husband, a military officer, on a tour of duty in Korea for part of the period.

Matter of: Mrs. Lujuana Butts, October 12, 1983:

The Finance and Accounting Officer, United States Military Academy, West Point, New York, requests an advance decision concerning the period to which Mrs. Lujuana Butts, 577-58-6170, is entitled to backpay in compliance with an order of the Equal Employment Opportunity Commission. We find that Mrs. Butts is entitled to backpay less appropriate offsets for the full period of her claim, September 1979 to January 1982.

Mrs. Lujuana Butts, whose husband, Lieutenant Colonel Melvin Butts, USA, apparently was assigned to duty in the West Point area, applied for a teaching position at the West Point Elementary School in May of 1979. These teaching positions are personal service contract positions hired on renewable 1-year contracts as opposed to positions appointed under civil service.

On June 1, 1979, Colonel Butts requested an accompanied tour of duty in Korea; that is, a tour on which he is entitled to bring his family.

The Superintendent of Schools interviewed Mrs. Butts on June 23, 1979, and again on August 6, 1979. The Superintendent informed Mrs. Butts on August 6, 1979, that she had not been selected for the teaching position.

In July 1980 Colonel Butts was transferred to Korea on an accompanied tour and his family, including Mrs. Butts, joined him there.

Mrs. Butts filed a discrimination complaint against the United States Army which was upheld by the Equal Employment Opportunity Commission on December 9, 1981. The Commission found that Mrs. Butts' nonselection was due to discrimination based on race and color and it ordered the Department of the Army to offer her a position as an elementary classroom teacher or a similar position. It further ordered that if she declined the offer, the Army should

award her a sum equal to the pay she would have received from September of 1979 until the date the offer was made. Mrs. Butts apparently received and declined the offer of employment at the West Point Elementary School on January 12, 1982, while she was in Korea with her husband.

Mrs. Butts is entitled to recover backpay in either of two amounts. The amount of backpay depends on a determination of her availability for the position during the period between September of 1979 and January of 1982. If she was available for the position during this entire period she is entitled to backpay for the entire period which the disbursing officer has computed, after offsets, to be $35,211. If she was unavailable for the position after June of 1980, because she accompanied Colonel Butts to Korea, she is entitled to backpay only for the period from September 1979 to June 1980, which the disbursing officer computes as $18,680.

The Army questions whether Mrs. Butts can be considered available for the position for the school years 1980-1981 and 1981-1982 since she was not in the West Point area then and was in Korea with her husband on a tour of duty he had requested in June 1979.

Colonel and Mrs. Butts contend that the accompanied tour was requested in June 1979 in an effort to "keep all options open" and that she would have remained in West Point during Colonel Butts' tour of duty in Korea had she been selected for the teaching position. In this regard Mrs. Butts explains in part as follows:

> Significantly, at the time my husband made his initial request to have the family accompany him to Korea I was unemployed. However, I had every hope of being hired to a teaching position at West Point. As I recall, his request for an accompanied tour was not approved until several weeks after I was informed of my nonselection for a teaching position at West Point Elementary School. Had I been selected to teach at West Post [sic], we would have exercised our option not to have me go to Korea with Melvin. Indeed, that was our option which could have been exercised at any time right up until the day he departed the United States on 2 July 1980—one year later.
>
> It was certainly our right—and as we saw it—in our best interest to keep all options open. Had we not requested the accompanied tour, we would not have had a choice. I would have had to remain in the States as an unemployed teacher during my husband's one year assignment as a battalion commander in Korea. By having obtained approval on the request for an accompanied tour we had more of a guarantee of my employment during the FY 80-81 school year. Obviously, we made the correct decision.* * *

The statutory authority for the Commission's order directing award of backpay to Mrs. Butts is Title VII of the Civil Rights Act of 1964, as amended by Section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16(b).

Regulations promulgated under the Act direct an agency to offer an applicant employment of the type and grade denied him when it finds that the applicant has been discriminated against. If the offer is declined, the agency must award the individual a sum equal to the backpay he or she would have received from the date he or she would have been appointed until the date the offer was made. 29 C.F.R. § 1613.271(a)(1) (1982). This period may not extend from a

date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant. 29 C.F.R. § 1613.271(a)(4) (1982).

The regulations at 29 C.F.R. § 1613.271 provide that backpay is to be computed in the same manner prescribed by 5 C.F.R. § 550.804. In computing the amount of backpay under section 550.804, the agency may not include any period during which the employee was unavailable for performance of his duties for reasons other than those related to, or caused by, the discrimination. 5 C.F.R. § 550.804(d)(2) (1983). (The availability requirement was formerly contained in 5 C.F.R. § 550.805(c)(2) (1982) which was superseded as of January 1, 1983.)

Clearly, Mrs. Butts was available for the performance of the teaching duties during the period between September of 1979 until July 1980 when she left for Korea. In view of her statements to the effect that she would have remained at West Point rather than go to Korea had she received the teaching position, and since there was no bar to her having been able to do so that we are aware of, she should also be considered available for the employment for the balance of the period in question, including the time spent in Korea.

Accordingly, payment is authorized for the amount due for the full period, September 1979 to January 1982, and the voucher submitted is being returned for payment.

[B-211833]

Small Business Administration—Contracts—Contracting With Other Government Agencies—Procurement Under 8(a) Program—Procedures—Administrative Appeal Process

Protest against agency determination of fair market price for negotiations with the Small Business Administration under the section 8(a) program is dismissed where the administrative appeal process is being followed.

Matter of: Amertex Enterprises Ltd., October 17, 1983:

Amertex Enterprises Ltd. (Amertex) protests the alleged impropriety in the determination of the fair market price for negotiation of a contract under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), pursuant to request for proposals (RFP) DLA100-83-R-0080 issued by the Defense Personnel Support Center, Philadelphia, Defense Logistics Agency (DLA), for 289,970 camouflage, chemical protective suits.

We dismiss the protest.

Section 8(a) of the Small Business Act empowers the Small Business Administration (SBA) to enter into contracts with agencies of the Federal Government and to subcontract with disadvantaged small business concerns for the performance of the contract. For the purpose of negotiating with the SBA, the Defense Acquisition Regulation (DAR) § 1-705.5 (DAC No. 76-19, July 27, 1979) provides

for the determination of a "fair market price" by the contracting officer. It is the amount determined by the contracting officer and the manner of that determination which are protested by Amertex.

However, section 8(a) of the act expressly provides:

> Whenever the Administration and such procurement officer fail to agree, the matter *shall* be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator. [Italic supplied.]

DAR § 1-705.5(a) (DAC No. 76-19, July 27, 1979) provides for appeal by the Administrator of the SBA to the head of the appropriate department. The record shows that the Administrator of SBA filed an appeal with the Director of DLA by letter dated July 29, 1983, and the appeal is still pending.

Since the Small Business Act expressly mandates that disagreements between the SBA and the contracting officer in this matter "shall" be submitted for determination to the head of the procuring agency, our Office will not take jurisdiction.

[B-212237]

Bids—Qualified—Prices—Escalation

Although condition in low bid which stipulated that price adjustment would be made in the event that services of certain personnel were required constituted a price qualification in the nature of an escalation clause, low bid may be considered in the absence of an administrative determination that there was a real and not merely theoretical possibility that low bidder's final price to the Government will exceed the price of the next acceptable bid.

Matter of: Williams and Lane, Incorporated, October 24, 1983:

Williams and Lane, Incorporated (Williams and Lane), protests the proposed award of a contract to Alco Power Incorporated (Alco), under invitation for bids (IFB) No. N6247081-B-8610, issued by the Naval Facilities Engineering Command (Navy), for six diesel-driven generating units for the Puget Sound Naval Shipyard in Bremerton, Washington.

We deny the protest.

The solicitation provided for the quotation of a lump-sum price for one generating system, including field service costs based upon 600 8-hour man-days and 20 round trips to the construction site for installing and operating the system. The pricing schedule also required bidders to provide a breakdown of their lump-sum price showing labor and transportation rates for field service employees so that the contract price could be adjusted in the event that the actual work performed exceeded or was less than the estimated 600-man-day requirement or 20 round trips. Award was to be made on the basis of the lump-sum price.

Five bids were received in response to the solicitation. The protester was the second low bidder, quoting a lump-sum price of $4,843,769, and Alco was the low bidder with a price of $4,721,999. Alco listed field service prices as follows:

Alco listed field service prices as follows:

Man day rate	$360
(Based on 8 hour day)	(Rate per day per man.)
Transportation	$3,800*
(Round trip fare including car rentals, rooms, meals, travel time, etc.).	(Per round trip.)

*Alco power Incorporated has a Seattle-based serviceman. The fee for his services is incorporated in the foregoing price structure. If for any reason an Auburn-based electrical or mechanical engineer is required, this additional amount will be applicable and includes a period of thirty days per trip from Auburn, New York. This is not an expected requirement.

Williams and Lane argues that Alco qualified its bid by stating, as cited above, "If for any reason an Auburn-based electrical or mechanical engineer is required, this additional amount will be applicable." Specifically, Williams and Lane asserts that the inclusion of this language in Alco's bid allows Alco to charge the Government, in addition to its lump-sum price of $4,721,999, $360 per day for each 30-day period that an Auburn-based engineer is required at the jobsite as well as $3,800 in transportation costs for that engineer. In other words, Williams and Lane maintains that Alco's lump-sum price of $4,721,999 includes field service costs for Seattle-based engineers only and if for any reason an Auburn-based engineer is required, Alco's bid price will escalate. Thus, Williams and Lane contends that it is impossible to determine whether Alco is, in fact, the low bidder.

The Navy maintains that Alco's lump-sum price includes labor costs for either Seattle or Auburn-based engineers. The Navy explains that the placement of the asterisk directly by the transportation item amount merely indicates that an additional $3,800 in transportation costs will be payable if an Auburn-based engineer is required. Thus, the Navy maintains that it is unlikely that Alco's price will exceed the price of the next low bid.

We agree with the Navy that the asterisk directly following the transportation item refers to that item only. There is no reason to infer that an asterisk which is placed directly against one specific item amount applies to any other item. Therefore, we believe that the Navy reasonably concluded that, under the terms of Alco's bid, the Government is obligated only to pay an additional amount of $3,800 per round trip for the transportation of Auburn-based engineers.

Nevertheless, we find that the insertion of language in Alco's bid requiring the Government to make additional payments for transportation, "if for any reason" Auburn-based engineers are required, constitutes a price qualification in the nature of an escalation clause. This in itself would not be sufficient to prevent considera-

tion of the bid if it were possible to determine the maximum amount of additional transportation costs to the Government under the provisions of the escalation clause. In that event, the bid would be for evaluation on the basis of the maximum escalated cost to the Government. 36 Comp. Gen. 259 (1956). However, we also have held a bid containing an escalation provision, under which no maximum ceiling could be determined, may properly be considered and evaluated where the likelihood that the ultimate cost to the Government under that bid would exceed the amount of the next acceptable bid was so remote as to be negligible. 36 Comp. Gen., *supra;* B-135393, March 28, 1958. A bid should not be rejected under these circumstances except upon an administrative determination that there is a real and not merely a theoretical possibility that the low bidder's final price to the Government will exceed the price of the next acceptable bid. 36 Comp. Gen., *supra,* at pp. 261-262; B-135393, *supra; Homemaker Health Aid Service,* B-188914, September 27, 1977, 77-2 CPD 230.

Under the terms of Alco's bid, the Government is obligated to pay an additional $3,800 in transportation and per diem costs for each 30-day period an Auburn-based mechanical or electrical engineer is required at the construction site. While the total number of man-days for this project is subject to adjustment, bidders were instructed to base their price upon 600 man-days at the construction site. Assuming that an Auburn-based engineer made 20 round trips to the construction site or, in other words, was present at the site for the entire estimated 600 man-days, Alco's bid still would be over $45,000 lower than the next low bid. Thus, based upon this information, we agree with the Navy that the possibility that Alco's bid price would exceed the price of the next low bid is extremely remote. Accordingly, Alco's bid should not be rejected on this basis.

The protest is denied.

[B-211076]

Leaves of Absence—Military Personnel—Payments for Unused Leave on Discharge, etc.—Court-Martial Review Pending—Appellate Leave Benefits

Amendments to 10 U.S.C. 706 and 876a provide that court-martialed enlisted personnel with adjudged bad conduct or dishonorable discharges may be compelled to take leaves of absence pending completion of appellate review, and that when they are placed on appellate leave they may elect to receive payment for any accrued leave to their credit either in a lump-sum settlement or as pay and allowances during leave. The amendments were designed to avoid any necessity of restoring these persons to duty after their courts-martial, and to allow them some monetary assistance in their transition to civilian life. Payments may be made even though the member's term of enlistment has expired.

Leaves of Absence—Military Personnel—Payments for Unused Leave on Discharge, etc.—Court-Martial Review Pending—Appellate Leave Benefits—Computation

The lump-sum monetary leave settlement authorized by 10 U.S.C. 706 for court-martialed enlisted personnel required to take appellate leave is to be "based on the rate of basic pay" to which they are entitled on the day before they are placed on leave. Even though they may be in a nonpay or reduced pay status that day because their enlistments have expired or for some other reason, they still have a "rate" of basic pay, which is the full rate applicable by law to the enlisted grade they hold, and the lump-sum settlement is to be computed on the basis of that rate.

Leaves of Absence—Military Personnel—Payments for Unused Leave on Discharge, etc.—Court-Martial Review Pending—Appellate Leave Benefits

The rule is well settled that no credit for pay and allowances accrues to court-martialed enlisted personnel during periods after their enlistments expire, unless they are restored to a full duty status, or they are found to have been held over in service for the convenience of the Government if their sentences are completely set aside on appeal. The payment of pay and allowances to court-martialed enlisted members involuntarily placed on appellate leave after their terms of enlistment have expired, as specifically authorized by statute on the basis of unused leave previously accrued during past periods of creditable service, is not in conflict with this rule.

Leaves of Absence—Military Personnel—Payments for Unused Leave on Discharge, etc.—Court-Martial Review Pending—Appellate Leave Benefits—Computation

The appropriate rate of pay to be used, in computing the lump-sum leave settlement or pay and allowances payable to court-martialed enlisted personnel with adjudged punitive discharges who are required to take appellate leave, is the appropriate rate of the grade to which the enlisted member was reduced as a result of the court-martial.

Matter of: Department of Defense Military Pay and Allowance Committee Action Number 557, October 31, 1983:

This matter concerns the question of whether court-martialed enlisted personnel whose enlistments have expired are entitled to any of the appellate leave benefits authorized by 10 U.S.C. 706.[1]

We conclude that these members are entitled to the same benefits under 10 U.S.C. 706 as those whose terms of enlistment have not expired.

Background

The Department of Defense Military Pay and Allowance Committee notes that the Military Justice Amendments of 1981, Public Law 97-81, approved November 20, 1981, 95 Stat. 1085, added article 76a to the Uniform Code of Military Justice (10 U.S.C. 876a),

[1] This matter was submitted by the Assistant Secretary of Defense (Comptroller). The circumstances giving rise to this general question are described in Department of Defense Military Pay and Allowance Committee Action Number 557, which is incorporated in the Assistant Secretary's request.

which provides that an accused enlisted member who has been found guilty and sentenced by a court-martial may be required to take a leave of absence pending the completion of the appellate review of his case, if the sentence includes an unsuspended bad-conduct or dishonorable discharge. Public Law 97-81 also added section 706 to title 10 of the United States Code, which provides that this appellate leave is to be charged as "excess leave" without pay if the accused has no accrued leave to his credit. However, if the accused does have accrued leave to his credit, 10 U.S.C. 706 gives him the right to elect either (1) to receive a lump-sum monetary settlement for his accrued leave "based on the rate of basic pay to which [he] was entitled on the day before the day [the appellate] leave began," or (2) to receive military pay and allowances after he is involuntarily placed on appellate leave until the accrued leave to his credit is exhausted.

It has long been the rule that when an enlisted person is held in military confinement or control beyond the expiration of his enlistment due to court-martial charges against him, accrual of credit for pay and allowances terminates on the date his term of enlistment expires, unless he is acquitted at the trial or his sentence is completely set aside on appeal, or unless he is restored to full-duty status pending the completion of appellate review. This rule is currently published in paragraph 10317 of the Department of Defense Military Pay and Allowances Entitlements Manual.

Because of this rule uncertainties have arisen concerning the propriety of paying either the lump-sum monetary leave settlement or the military pay and allowances authorized by 10 U.S.C. 706 to court-martialed service members whose terms of enlistment have expired. Four specific questions designed to resolve these uncertainties are presented.

Lump-Sum Leave Settlement

The first question presented is:

1. May a member whose enlistment expires while in confinement and who is subsequently required to take leave under 10 U.S.C. 876a pending review of Court-Martial conviction be paid for accrued leave to his credit if he elects to be paid under 10 U.S.C. 706(b)?

Congress added article 76a to the Uniform Code of Military Justice with enactment of the Military Justice Amendments of 1981, Public Law 97-81, to give military commanders the authority to compel court-martialed service members to take leaves of absence pending the completion of appellate review if the sentences adjudged include a punitive discharge. Previously, those members were restored to duty after completing any confinement included in their sentences unless they volunteered to take a leave of absence. Congress concluded that morale and discipline within the Armed Forces would be improved if these persons were no longer allowed the option of returning to duty. The Congress also added

section 706 to title 10 of the United States Code to authorize these persons to be paid for any accrued leave to their credit when they were involuntarily placed on appellate leave apparently as a means of allowing them some measure of monetary assistance for their transition into the civilian community. It was particularly noted that they would be ineligible for unemployment benefits administered by the Department of Labor to help them make that transition because of the punitive discharges included in their court-martial sentences. See H.R. Rep. No. 306, 97th Cong., 1st Sess. 1-4, *Reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 1769-1772.

Prior to enactment of the Military Justice Amendments of 1981, lump-sum monetary settlements for unused accrued leave had generally been authorized only for military personnel separated from service under honorable conditions. See 37 U.S.C. 501. The 1981 legislation authorized payment of a lump-sum leave settlement to court-martialed service members sentenced to receive punitive discharges when they are involuntarily placed on appellate leave. That payment is to be "based on the *rate* of basic pay" to which they were entitled on the day before the appellate leave began. [Italic supplied.] The question is whether any payment may be made to court-martialed members who are in a nonpay status on that day because of the previous expiration of their enlistments.

Court-martial sentences are effective from the date adjudged and approved or on the date they are ordered executed. Pending appellate review, the sentence is considered effective except for the actual discharge which is held in abeyance until review has been completed. 10 U.S.C. 858a.

Many persons required to take appellate leave under article 76a of the Uniform Code of Military Justice will be in a nonpay or reduced pay status on the day before their departure, either because of the previous expiration of their terms of enlistment or because of other reasons. However, we have recognized that an enlisted member in a nonpay status nevertheless has a *rate* of basic pay, which is the full rate applicable by law to the particular enlisted grade he holds. See 35 Comp. Gen. 666 (1956) and 37 *id.* 228 (1957). Although those decisions were limited to questions involving the lump-sum leave settlements payable to Reserve members who were in a nonpay status because they were held over for court-martial beyond the expiration of their fixed tours of active duty rather than their terms of enlistment, we find that the purpose of 10 U.S.C. 706(b) will be best served if this principle is extended generally and uniformly to every enlisted person involuntarily placed on appellate leave. In particular, we find that since the court-martialed enlisted personnel here in question will retain an enlisted grade until their final discharges are executed following the completion of appellate review, they will have a rate of basic pay on the day before they are placed on appellate leave upon which the lump-sum leave settlement under 10 U.S.C. 706(b) may be based re-

gardless of the amount of basic pay which is actually payable to them for that day. Hence, we conclude that court-martialed enlisted members departing on appellate leave who have accrued leave to their credit may elect to receive a lump-sum monetary leave settlement under 10 U.S.C. 706(b) based on the full rate of basic pay applicable to their enlisted grade even though they may be in a nonpay or a reduced pay status at the time because their enlistments have expired or for some other reason.

Pay and Allowances During Leave

The second and third questions presented by the Committee are:

2. Is a member whose enlistment expires while in confinement who is subsequently required to take leave under 10 U.S.C. 876a pending review of Court-Martial conviction entitled to pay and allowances under 10 U.S.C. 706 during the period of leave required to be taken?

3. Is a member who is required to take leave under 10 U.S.C. 876a pending review of Court-Martial conviction whose enlistment expires during such leave entitled to pay and allowances under 10 U.S.C. 706 after the date his enlistment expired?

It is a well settled rule that no credit for pay and allowances accrues to a court-martialed enlisted member during periods after the expiration of his term of enlistment, unless he is restored to a full-duty status or is found to have been held over in service for the convenience of the Government. See 30 Comp. Gen. 449, 451 (1951); 33 *id.* 281 (1953); 37 *id.* 228 (1957); and 59 *id.* 12 (1979), *id.* 595 (1980). See also *Carter* v. *United States,* 206 Ct. Cl. 61, 70 (1975), *cert. denied* 423 U.S. 1076 (1976); and *Cowden* v. *United States,* 220 Ct. Cl. 490, 498 (1979). Since court-martialed enlisted members whose sentences are not completely set aside on appeal are thus found to have been held over in military control by reason of their own misconduct rather than for the convenience of the Government, no pay and allowances can be considered to have accrued to their credit beyond the expiration of their enlistments except during periods when they may have been returned to the performance of their full military duties while awaiting the outcome of appellate review. This rule is currently expressed by regulation in paragraph 10317, Department of Defense Military Pay and Allowances Entitlements Manual.

Under the Military Justice Amendments of 1981, article 76a of the Uniform Code of Military Justice now makes it unnecessary to return court-martialed enlisted members with adjudged bad-conduct or dishonorable discharges to duty pending the results of appellate review, and 10 U.S.C. 706 now specifically authorizes payment of military pay and allowances to those persons if they are instead involuntarily placed on appellate leave. However, the payment so authorized is to be based only upon unused leave previously accrued during past periods of creditable service, and does not represent pay or allowances accrued on the basis of an accused's current activities or status. See 10 U.S.C. 706(b)(2). We do not find

that payment of pay and allowances to an accused whose enlistment has expired, as specifically authorized by statute on the basis of unused leave accrued during earlier periods of creditable service, to be in any way inconsistent or in conflict with the above-described rule which generally prohibits the accrual of credit for pay and allowances during periods following the expiration of a term of enlistment. Hence, we conclude that the pay and allowances authorized by 10 U.S.C. 706 are payable without regard to whether the accused's enlistment has expired.

Rate of Pay

The fourth question presented is:

4. If your answer to any of the above questions is yes, what rate of pay would be appropriate?

In answer to the first three questions, we concluded that court-martialed enlisted members with accrued leave to their credit who are required to take leaves of absence under article 76a of the Uniform Code of Military Justice may elect to receive either a lump-sum settlement or pay and allowances for that accrued leave under 10 U.S.C. 706, regardless of whether their terms of enlistment have expired.

As indicated, the lump-sum monetary leave settlement will be based on the full rate of basic pay applicable to their enlisted grade on the day before they are placed on appellate leave. Because of the punitive discharges included in their sentences, article 58a of the Uniform Code of Military Justice (10 U.S.C. 858a) provides that unless otherwise provided in regulation, they will be reduced to the lowest enlisted grade, E-1. Hence, unless otherwise provided the rate of pay applicable on the day before appellate leave begins and the rate to be used in computing the lump-sum settlement will be the appropriate basic pay rate for pay grade E-1. If he has not been reduced to the lowest enlisted grade, the rate of pay applicable will be the rate to which he was reduced by court-martial sentence.

In the event an accused does not elect to receive a lump-sum monetary settlement for his accrued leave, he will be entitled to the military basic pay and allowances of his grade commencing on the day he is placed on appellate leave and continuing for as many days of accrued leave as he has to his credit. Again, the pay grade to which the member was reduced as a result of court-martial sentence will be applicable to the computation of pay and allowances on those days.

The questions presented are answered accordingly.

U.S. GOVERNMENT PRINTING OFFICE: 1984 O - 431-974